IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1369

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B. ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER and CYNTHIA SWANSON,

Appellants,

against

EDWARD V. REGAN, as Comptroller of the State of New York, and GORDON AMBACH, as Commissioner of Education of the State of New York,

Appellees,

and

HORACE MANN-BARNARD SCHOOL, LA SALLE ACADEMY, LONG ISLAND LUTHERAN HIGH SCHOOL, ST. MICHAEL SCHOOL and YESHIVAH RAMBAM,

Intervening Parties-Appellees.

BRIEF FOR APPELLANTS

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Opinions Below

The majority and dissenting opinions of the District Court, as yet unreported, are set forth in the Appendix to the Jurisdictional Statement herein. In this brief, page references thereto will be preceded by the letters J. S.

Jurisdiction

The decisions of the District Court and the judgment thereon were made and entered on the 20th day of December, 1978. Notice of appeal therefrom was duly served and filed on January 22, 1979. Probable Jurisdiction was noted on June 11, 1979.

Jurisdiction is based upon 28 United States Code, Sec. 1253, 2281, 2284, and upon *Flast* v. *Cohen,* 392 U.S. 83 (1968); *Board of Education* v. *Allen,* 392 U.S. 236 (1968); *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971); *Tilton* v. *Richardson,* 403 U.S. 672 (1971); *Levitt* v. *Committee for Public Education and Religious Liberty,* 413 U.S. 472 (1973); *Meek* v. *Pittenger,* 421 U.S. 349 (1975); and *Wolman* v. *Walter,* 433 U.S. 229 (1977).

Statute Involved

The statute involved herein is Chapter 507 of the New York Laws of 1974, as amended by Chapter 508 of the New York Laws of 1974. The provisions involved in this appeal are set forth on pages 4-6, and the full text of the statute on pages E1-5 of the Jurisdictional Statement.

Questions Presented

1. Does the reimbursement by the State of nonpublic sectarian schools for costs of record keeping and testing violate the Establishment Clause of the First Amendment to the Constitution of the United States, where the records are kept and the tests are administered pursuant to requirements of State law and regulation for the purpose

of determining whether or not the nonpublic schools are complying with the State's compulsory attendance laws, both in terms of actual attendance of pupils upon instruction and in terms of the requirement that such nonpublic schools provide an acceptable prescribed minimum standard of education to the pupils so enrolled?

2. Does Chapter 507, as amended by Chapter 508, of the New York Laws of 1974 comply with the guidelines set down by the decision of this Court in *Levitt* v. *Committee for Public Education and Religious Liberty, supra,* by eliminating teacher-prepared tests from those whose costs are subject to reimbursement and by providing reimbursement for only the actual costs of the services rendered?

3. Does the decision of this Court in *Wolman* v. *Walter, supra,* require a determination that the statutes challenged herein do not violate the Constitution of the United States?

Statement of the Case

Plaintiffs commenced this action to have Chapters 507 and 508 of the New York Laws of 1974 declared unconstitutional, alleging that those statutes violate the Establishment Clause of the First Amendment to the Constitution of the United States. Plaintiffs also alleged that the statutes violate the Free Exercise of Religion Clause of the First Amendment in that they violate the free exercise of religion through compulsory taxation to support religious schools. The complaint sought declaratory judgment and injunction restraining the implementation of the laws, insofar as they provide money for sectarian schools.

A motion to intervene in the action was made by a group of nonpublic schools which are beneficiaries of payments under the acts. The motion was granted.

The District Court, in its original decision, found the New York statutes to be unconstitutional in that they contravened the prohibitions of the Establishment Clause of the First Amendment, but did not reach the question of whether they also violated the Free Exercise Clause. The Court based its ruling upon the decision of this Court in *Meek* v. *Pittenger, supra.* It found that while the statutes do have a "secular legislative purpose," they also have the "primary effect" of advancing religion. It did not reach the question of whether the statutes resulted in excessive entanglement between government and religion or whether they violate the Free Exercise Clause.

On appeal, this Court vacated the District Court's judgment and remanded the case for reconsideration in the light of *Wolman* v. *Walter, supra.* On reconsideration, the District Court, in an opinion by Circuit Court Judge Mansfield, over the dissent of District Court Judge Ward, upheld the constitutionality of the challenged statute.

Summary of Argument

In order to pass constitutional muster, a statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive entanglement with religion.

The challenged statute constitutes an impermissible law respecting an establishment of religion in that it has a

principal or primary effect that advances religion. It is constitutionally indistinguishable from all other statutes financing educational services in religious schools, at least at the elementary and secondary school levels, and, with the single exception of *Board of Education* v. *Allen, supra,* have been uniformly held unconstitutional by this Court. In respect to *Allen,* the Court has consistently manifested a clear intent not to extend its holding beyond the specific facts of the case, i.e., governmental subsidization of the purchase of secular textbooks loaned to the pupils.

Independently of purpose, the statute is invalid in that it fosters excessive entanglement with religion. Here, too, with the exception of *Allen* it is constitutionally indistinguishable from all other statutes passed upon by the Court involving a governmental financing of educational services and uniformly held unconstitutional on that ground.

The District Court was in error in adjudging that *Wolman* v. *Walter, supra,* manifests an intent on the part of this Court to weaken or otherwise modify its consistent application of the purpose-effect-entanglement test in respect to aid to religious schools.

Background of the Case

Chapters 507 and 508 of the 1974 Laws of New York, which authorize the State to reimburse private schools for the cost of performing state-mandated pupil testing and record keeping, were enacted to achieve what this Court held constitutionally impermissible in *Levitt* v. *Committee for Public Education and Religious Liberty,* 413 U.S. 472 (1973) (*Levitt I*). There the Court struck down an earlier New York statute on the same subject as violative of the

Establishment Clause on the ground that it authorized State financing of tests prepared by sectarian school teachers, which might be used for religious instruction and that the statute had no auditing provisions designed to insure that sectarian schools would be reimbursed by the State only for secular services.

In 1974 the Legislature responded by enacting the statute challenged herein, which sought to remedy the features found objectionable by this Court by providing for State preparation of the tests and auditing procedures to assure that private schools would be reimbursed only for these State-mandated services.

Thereafter, in *Committee for Public Education and Religious Liberty* v. *Levitt,* 414 F. Supp. 1174 (1976) (*Levitt II*), the District Court held that despite these changes the amended statute did not pass muster under the Establishment Clause. After this Court decided *Wolman,* it vacated the District Court's judgment in *Levitt II* and remanded the case for reconsideration in light of *Wolman.*

On remand the District Court held an evidentiary hearing to receive proof relevant to the issues. That proof consisted of a stipulation of facts (Appendix 24a *et seq.*). The stipulation did not set forth any facts differing from those before the District Court when it decided the present suit, nor did the District Court rely upon any new understanding of the factual issues. Its sole reason for reaching a decision contrary to its original one was its determination that *Wolman* had "relaxed some of *Meek's* constitutional strictures against state aid to sectarian schools" and that application of the *Wolman* standards required it to conclude "that amended Chapter 507 may be upheld as constitutional" (J.S. A3).

The amended statute, which became effective July 1, 1974, provides for reimbursement to private schools of the "actual cost" of complying with State requirements for pupil attendance reporting and the administration of State-prepared standardized examinations such as Regents examinations and pupil evaluation tests. These reports and tests are required of public and private schools alike and are designed to improve the educational program offered in New York schools. It is this provision as applied to religious schools (but not as applied to non-religious private schools) which is challenged in the present suit.

In its initial decision, the District Court, having determined that the challenged statute violated the effect aspect of the tri-part test under the Establishment Clause, found it unnecessary to decide whether it also violated the entanglement aspect. 414 F. Supp. at 1180. In the present case, however, its disposition of the former aspect required it to pass upon the latter. In that respect it held that the challenged statute did "not pose any substantial risk of . . . entanglement." J.S. pp. A15-16.

ARGUMENT

I. Introductory

In numerous cases decided within the past decade, the Court has interpreted the Establishment Clause to the effect that in order to pass constitutional muster, a statute must have a secular legislative purpose, must have a principle or primary effect that neither advances nor inhibits

religion, and must not foster an excessive entanglement with religion. *Lemon* v. *Kurtzman, supra; Earley* v. *DiCenso,* 403 U.S. 602 (1971); *Sanders* v. *Johnson,* 403 U.S. 955, affirming without opinion, 319 F. Supp. 421 (1971); *Committee for Public Education and Religious Liberty* v. *Nyquist,* 413 U.S. 756 (1973); *Levitt* v. *Committee for Public Education and Religious Liberty, supra; Sloan* v. *Lemon,* 413 U.S. 825 (1973); *Meek* v. *Pittenger, supra; Wolman* v. *Walter, supra; New York* v. *Cathedral Academy,* 434 U.S. 125 (1977).

Prior to these decisions, beginning with *Everson* v. *Board of Education,* 330 U.S. 1 (1947) and in many succeeding cases, the Court held that the Clause means "at least" that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion" (330 U.S. at 16).

In its more recent decisions applying the purpose-effect-entanglement test the Court manifested no intention of abandoning or weakening in any way the so-called *Everson* no-aid test. Indeed, in its initial decision in the present case the District Court itself quoted and relied upon the above quotation from *Everson* (Statement as to Jurisdiction in *Levitt II,* Appendix A, p. A11).

It is our contention that whether the *Everson* no-aid or the purpose-effect-entanglement test of the more recent decisions is applied, the statute challenged herein cannot stand. We predicate this contention primarily upon the effect and entanglement aspects of the latter test, although we believe and respectfully submit that it fails to under

the purpose aspect. See, *Epperson* v. *Arkansas,* 393 U.S. 97 (1968); *McGowan* v. *Maryland,* 366 U.S. 420, 453 (1961).

II. Advancement of Religion

1. For the following reasons we submit that the challenged statutes effect an impermissible advancement of religion. The fact that the services sought to be compensated under the challenged statute are mandated by law is constitutionally irrelevant. This was determined in *Levitt I* and in *Nyquist,* the former dealing with the predecessor of the present Chapter 507, the latter (in its first part) with law-mandated requirements that schools be safe, sanitary, illuminated and heated.

2. As in *Meek,* the last full scale consideration of the Establishment Clause before *Wolman,* the State of New York "does not inquire into the religious characteristics, if any, of the nonpublic schools requesting aid" under the statute. As in *Meek,* a school is not barred from receiving aid "even though its dominant purpose [is] the inculcation of religious values, even if it impose[s] religious restrictions on admssions or on faculty appointments,[1] and even if it require[s] attendance at classes in theology or at religious services."[2]

1. Of the five intervening defendants in this case, all but Horace Mann-Barnard School (which, plaintiffs concede, is not constitutionally barred from receiving benefits under the challenged statute, and which therefore had no reason for intervening in this suit) have elected to be considered religious or denominational institutions under the provision of Section 313 of the Education Law. See, in each case, Response to Interrogatories, Interrogatory 4. This election exempts them from the statutory prohibition of religious discrimination in admission of students and employment of faculty. National Labor Relations Board v. Catholic Bishop of Chicago, 99 S. Ct. 1313 (1979).

2. Four of the intervening defendants require pupils to attend classes in the religion of the sponsoring school. See Responses to Interrogatory 5 (d).

3. As in *Meek,* the "primary beneficiaries" of the statute "are nonpublic schools with a predominant sectarian character." In Pennsylvania, the situs of *Meek,* more than 75% of the schools that qualified for state aid were "church-related or religiously affiliated educational institutions." In New York the percentage is about 85. See *Nyquist,* 413 U.S. at 768, footnote 23.

4. As in *Meek,* the state aid is directly to the schools and not to the pupils or their parents (although, of course, even if the latter were true the law would still be unconstitutional under the second and third parts of *Nyquist* and *Sloan* v. *Lemon, supra*).

5. The auxiliary services invalidated in *Meek* were rendered by publicly employed personnel. Under Chapter 507 the services are rendered by the nonpublic school teachers and the money goes to the school, obviously a more direct and substantial aid to the religious schools.

6. As in *Meek,* the challenged services are not in the category of health or welfare, but are purely educational; conducting examinations and taking attendance are obviously educational and not health or welfare operations.

7. Mr. Justice White was the sole dissenter in *Lemon-DiCenso,* but even he agreed that if any school restricted entry on religious grounds or required all students gaining admission to receive instruction in the tenets of a particular faith, the aid legislation would to that extent be unconstitutional as impermissible advancement of religion (403 U.S. at 671, footnote 2). As we have noted, the religious intervening defendants do just that.

8. What the Court said in *Meek* is no less applicable here. "Even though earmarked for secular purposes, when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission, state aid has the impermissible effect of advancing religion." As in Pennsylvania, "[t]he very purpose of many of these schools is to provide an integrated secular and religious education . . . The secular education these schools provide go hand in hand with the religious mission that is the only reason for the schools' existence." It follows from this that "[s]ubstantial aid to the education function of such schools . . . necessarily results in aid to the sectarian school enterprise as a whole." 421 U.S. at 366-367.

All this is applicable even if the auditing and examination procedures prescribed in Section 7 remain in the Act. If these are excised, by reason of Chapter 508 (Section 9 of the combined statute. J.S. E4-E5), the advancement of religion effect of the statute becomes even more flagrant. As the Court stated in *Meek,* the courts may not rely "entirely on the good faith and professionalism of the secular teachers and counselors functioning in church-related schools to ensure that a strictly nonideological posture is maintained . . . The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion . . ." 421 U.S. at 369. Absent auditing and examination the schools have a free hand to use the State funds to advance religion.

III. Entanglement

A. District Court's Disposition

The District Court's initial decision did not pass upon the entanglement issue, raised in the complaint; having

found the challenged statute invalid under the effect prohibition there was no need to do so. On remand, it now obviously became necessary to do so, since the effect barrier was found by the Court not to be present. Its disposition of this aspect, however, was quite summary, at least as compared to its treatment of the effect mandate. For this Court's convenience we reproduce it in full, omitting only the somewhat longer footnote 8.

> Where a state is required in determining what aid, if any, may be extended to a sectarian school, to monitor the day-to-day activities of the teaching staff, to engage in onerous, direct oversight, or to make on site judgments from time to time as to whether different school activities are religious in character, the risk of entanglement is too great to permit governmental involvement. See, e.g., *Lemon, supra,* 403 U.S. at 619-22; *Meek, supra,* 421 U.S. at 370-71. The activities subsidized under the Statute here at issue, however, do not pose any substantial risk of such entanglement.
>
> The services for which the private schools would be reimbursed are discrete and clearly identifiable. A teacher's taking of attendance, administration of examinations, and record-keeping can hardly be confused with his or her other activities. Although there might be a possibility of fraud or mistake in the records submitted by private schools of the teachers' time spent on such activities, *the careful auditing procedures anticipated by §7 of the Statute* should provide an adequate safeguard against inflated claims. In addition, since the services subsidized under the Statute are highly routinized, costs of the services for a given size of class vary little from school to school, thus enabling the State to check claims filed by private schools against records maintained by hundreds of public schools under State supervision. (Emphasis added.)

In view of this Court's extensive treatment of the entanglement aspect in decisions such as *Lemon,* 403 U.S. 614-626, and *Meek,* 421 U.S. 367-373, among others, it would seem that the District Court's summary disposition of the entanglement barrier is hardly adequate.

B. Administrative Entanglement and Surveillance

As the District Court noted, the statute prescribes "careful auditing procedures." This mandate, we submit, cannot be obeyed without administrative entanglement and surveillance. Even if Section 7 were eliminated from the statute, Section 9 (J.S. E4-E5), the Religion Clauses of the First Amendment forbid the State to grant money to religious schools on their bare assertion that the grant does no more than compensate them for neutral, nonideological, noneducational services.

The services of religious school teachers compensated for under the act are not purely ministerial. Administering examinations to evaluate achievement, even examinations formulated by State officials, is itself an educational operation, and may be used by overzealous teachers as a means to inculcate religious values.

Moreover, and no less important, the State must be certain that the money received by each religious school covers only the time used by the teachers to perform the mandated services (assuming that taking attendance for reporting to State officials can be separated from taking attendance which every school does for its own administration and would do even if it were not required to report to the State). Certainly it would violate the Establishment Clause as well as the statute if the moneys received by a school covered

time that was used for regular teaching rather than attendance keeping.

The State recognizes this and has sought to guard against it. We respectfully call this Court's attention to pp. 31-32 of Laws, Regulations and Guidelines, Apportionment to Nonpublic Schools, Exhibit 1 in Response to Interrogatories, and to System of Accounts for Nonpublic Schools Receiving State Aid under Chapter 507, Exhibit 4 in Response to Interrogatories. We cite simply as one example of governmental entanglement in the internal affairs of church schools the statement on page 4 of the latter document that "a basic daily time record will need to be maintained to substantiate the percentage of salary to be allocated to each required service."

Section 7 of the act, providing for audit and examination, compounds the entanglement. In *Walz* v. *Tax Commission,* 397 U.S. 664 (1970), the Court upheld tax exemption of church property on the ground that nonexemption would require the government to audit and examine the operations and records of churches and thus entangle it in religious affairs. The Court said:

> Obviously, a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards .... 397 U.S. at 675.

In *Lemon* v. *Kurtzman* and *Earley* v. *DiCenso, supra,* it struck down for the same reason direct financial aid to church schools to compensate for so-called neutral, nonideological secular services. There the Court said:

There is another area of entanglement in the Rhode Island program that gives concern. The statute excludes teachers employed by nonpublic schools whose average per-pupil expenditures on secular education equal or exceed the comparable figures for public schools. In the event that the total expenditures of an otherwise eligible school exceed this norm, *the program requires the government to examine the school's records in order to determine how much of the total expenditures is attributable to secular education and how much to religious activity.* This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches. The Court noted "the hazards of government supporting churches" and we cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses.

* * *

> The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance. The government cash grants before us now provide no basis for predicting that comprehensive measures of surveillance and controls will not follow. *In particular the government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state.* 403 U.S. at 620-622. (Citations omitted. Emphasis added.)

In sum, we submit that it is impossible to administer the act to avoid violation of the advancement of religion

ban or of its own terms without the continuing state surveillance of church school operations which the Establishment Clause forbids.

C. Political Entanglement

In almost all of the cases in which the Supreme Court invalidated direct grants to church schools it emphasized the danger of political entanglement and divisiveness across religious lines. This concern is set forth most fully in *Lemon* v. *Kurtzman*, 403 U.S. at 622-624, where the Court said:

> A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs. In a community where such a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity. Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all of the usual political campaign techniques to prevail. Candidates will be forced to declare and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.
>
> Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential

> divisiveness of such conflict is a threat to the normal political process. To have States or communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency. We have an expanding array of vexing issues, local and national, domestic and international, to debate and divide on. It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government. The highways of church and state relationships are not likely to be one-way streets and the Constitution's authors sought to protect religious worship from the pervasive power of government. The history of many countries attests to the hazards of religion's intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief.
>
> Of course, as the Court noted in *Walz*, "[a]dherents of particular faiths and individual churches frequently take strong positions on public issues." We could not expect otherwise, for religious values pervade the fabric of our national life. But in *Walz* we dealt with a status under state tax laws for the benefit of all religious groups. Here we are confronted with successive and very likely permanent annual appropriations that benefit relatively few religious groups. Political fragmentation and divisiveness on religious lines are thus likely to be intensified.

As we have noted above, in *Meek* the Court reiterated this concern in holding Act 194 of the Pennsylvania Laws to be unconstitutional. What is true of Act 194 of the Pennsylvania Laws is no less true of Chapter 507 of the New York Laws. The combination of potential for political entanglement together with the administrative entanglement necessary to ensure that the state-compensated services do not

advance religion compels the conclusion that Chapter 507, with or without Section 7, violates the Establishment Clause.

IV. The Effect of *Wolman* v. *Walter*

The majority of the District Court in the present case determined that this Court's decision in *Wolman* mandated a reversal of its own decision and the upholding of the challenged statute. We respectfully suggest that the District Court was in error in this respect and that the decision did not, as the District Court asserts, "revive the more flexible concept that state aid to . . . [a sectarian] school's educational activities if it can be shown with a high degree of certainty that the aid will only have a secular value of legitimate interest to the State and does not present any appreciable risk of being used to aid transmission of religious views." J.S. A9.

The Court in *Wolman* gave no indication of any intent to modify or weaken all that it had determined in the many cases decided by it during the past decade. (Indeed, as we will indicate shortly, it went further than it had done in any previous case striking down laws granting financial aid to religious schools.) The Court expressly noted that the challenged Ohio statute did not authorize any payment to nonpublic school personnel for the costs of administering tests, so that it could not be claimed that the schools received direct aid in the form of such payment. Moreover, the Court reasoned that since parochial school personnel did not participate in either the drafting or the scoring of the tests, they did not control the content of the tests or their results. This, the Court held, served to prevent the use of the test as part of religious teaching, and thus avoided direct aid to religion. 433 U.S. at 239-40.

> These tests [the Court said] "are used to measure the progress of students in secular subjects." App. 48. Nonpublic school personnel are not involved in either the drafting or scoring of the tests. 417 F. Supp., at 1124. The statute does not authorize any payment to nonpublic school personnel for the costs of administering the tests. 97 S. Ct. at 2606.

In a significant footnote (fn 7) the Court added:

> 7. With respect to the tests the state appellees say: "*No financial aid is involved in Ohio.* The tests themselves are provided." Brief for State Appellees 8. As summarized by the private appellees:
>
> "The new Ohio Act has nothing to do with teacher-prepared tests. *It does not reimburse schools for costs incurred in testing. No money flows to the nonpublic school or parent.* It simply permits the local public school districts to send the standardized achievement test to the nonpublic schools and to arrange for the grading of those tests by the commercial publishing organizations which prepare and grade standardized achievement tests." Brief for Appellees Grit, et al. 53. (Emphasis added.)

In the present case nonpublic schools are involved in the scoring of the tests. The challenged statute does authorize payment—not to the religious school personnel but to the religious school itself, an even more flagrant violation of the Establishment Clause. It does not arrange for the grading of the tests by nonreligious commercial organizations which prepare it for the State. On the contrary, religious school personnel do participate in the grading of the tests. The District Court specifically found that "[s]ome of the examinations contain one or two essay questions . . . which, of course, cannot be graded mechan-

ically." J.S. A4. Among the subjects so tested are Earth Science (which includes evolution, c.f. *Epperson* v. *Arkansas,* 393 U.S. 97 [1968]) and Social Studies. It is axiomatic among educators that testing is part of the teaching process, and certainly so in subjects such as evolution and social studies where pupils are well aware that the teachers' religious and other biases (e.g., racial and political) may well effect the grade received. The fact that random samples of these examinations may be reviewed by the Regents hardly negates the basic fact that testing is a tool of teaching which can be used to convey religious teaching and reflect religious predilections. Moreover, even in respect to the Regents' review of the examination papers, that State intervention itself subjects the procedure to invalidation on the ground of entanglement.

That the Court in *Wolman* did not intend to overrule and vitiate all that it had held in previous cases involving aid to parochial schools at the elementary and secondary levels is clearly established by the fact that it went further in respect to those institutions than it had gone in any of its previous decisions. While expressing itself bound by its previous decision in *Board of Education* v. *Allen, supra,* the Court quite clearly indicated that it had no intention of going beyond the specific holding therein, and accordingly struck down the provision in the Ohio statute for the loan of instructional material and equipment even if they were "incapable of diversion for religions use." 433 U.S. at 248-51.

Moreover, in another respect the Court in *Wolman* went beyond what it had decided in previous cases. For the first time it held unconstitutional the financing of programs pro-

viding field trip transportation to such places as public museums in respect to parochial school pupils. Thus, just as it had refused to extend *Allen* beyond its narrow holding, so too it refused to extend the bus transportation case of *Everson* v. *Board of Education,* 330 U.S. 1 (1947) beyond its narrow holding. It is, we submit, difficult to reconcile the action of the Court in respect to transportation and instructional materials with a determination that the statutes challenged in the present suit do not violate the Establishment Clause.

The District Court's error in assuming that this Court has retreated from its steadfast position on aid to religious schools is manifested by the Court's disposition of three cases which came to it after *Wolman.* The first of these was *New York* v. *Cathedral Academy,* 434 U.S. 125 (1977). There it held that the State could not constitutionally reimburse sectarian schools for the cost of State-mandated record keeping and testing services which were incurred in reliance on the predecessor statute to Chapter 507 before it was held unconstitutional in *Levitt I.* Both the holding and the language of the Court in *Cathedral Academy* controvert the assumption, upon which the majority opinion in the District Court in the present case is based, that the Court has manifested a retreat from or weakening of the Establishment Clause strictures as interpreted and applied in all previous cases since *Lemon* v. *Kurtzman, supra.*

If, the Court held in *Cathedral Academy,* the challenged statute authorized payments for the identical services that were to be reimbursed under the law held unconstitutional in *Levitt,* it was invalid for exactly the same reasons that required invalidation of its predecessor. If, on the other

hand, the new statute empowered the New York Court of Claims to make an independent audit on the basis of which it would authorize reimbursement only for clearly secular services, such a detailed inquiry would itself violate the Establishment Clause by requiring the State to undertake a search for religious meaning in every classroom examination offered in support of a claim, thus imposing upon the Court of Claims the role of arbiter of an essentially religious dispute. "The prospect of church and state litigating about what does or does not have religious meaning [the Court said] touches the very core of the constitutional guarantee against religious establishment, and it cannot be dismissed by saying that it will happen only once."

The challenged statute, the Court concluded, was unconstitutional because it would of necessity either have the primary effect of aiding religion on the one hand or on the other would result in excessive involvement in religious affairs. There was, in other words, no escape from either the Scylla of aid or the Charybdis of entanglement. As we have noted, no government entanglement in religious affairs was involved in *Wolman,* and that decision therefore in no way affects the disposition of that challenge in the present case.

The second indicator that this Court in *Wolman* did not intend to water down the principles announced in *Meek* and its predecessors is found in *NLRB* v. *Catholic Bishop of Chicago, supra.* There the Court said, at 99 S. Ct. 1319:

> Only recently we again noted the importance of the teacher's function in a church school. "Whether the subject is 'remedial reading,' 'advanced reading,' or simply 'reading,' a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists." *Meek* v. *Pittenger,* 421 U.S. 349, 370, 95 S.Ct. 1753, 1766, 44 L.Ed.2d 217 (1975). Cf. *Wolman* v. *Walter,* 433 U.S. 229, 244, 97 S.Ct. 2593, 2603, 53 L.Ed.2d 714 (1977). Good intentions by government—or third parties—can surely no more avoid entanglement with the religious mission of the school in the setting of mandatory collective bargaining than in the well motivated legislative efforts consented to by the church-operated schools which we found unacceptable in *Lemon, Meek,* and *Wolman.*

It is significant that the opinion in the N.L.R.B. case was written by the Chief Justice, who himself dissented in *Meek.* In respect to the contested issue involved in the present case the Chief Justice recognized the binding effect of *Meek* notwithstanding *Wolman.*

The most recent indication that the District Court misinterpreted this Court's intentions in respect to the Establishment Clause is the Court's affirmance on May 29th of the decision by the United States Court of Appeals for the Third Circuit in the case of *Byrne* v. *Public Funds for Public Schools of New Jersey.* In that case the Court of Appeals (affirming a District Court decision) invalidated a provision in the New Jersey income tax law granting tax benefits to parents paying tuition for children attending religious schools. The precedential weight of the Supreme Court's affirmance is set forth in Footnote 16 in *Meek,* which reads as follows:

> 16. Our conclusion that Act 195's instructional-material and equipment-loan provisions are unconstitutional is directly supported if not compelled, by this Court's affirmance last term of *Public Funds for Public Schools* v. *Marburger,* 358 F. Supp. 29, aff'd, 417 U.S.

961, 94 S.Ct. 3163, 41 L.Ed.2d 1134. The *Marburger* District Court invalidated as violating the constitutional prohibtion against establishment of religion New Jersey's provision of instructional material and equipment to nonpublic elementary and secondary schools. New Jersey's program did not differ in any material respect from the loan provisions of Act 195. See 358 F. Supp., at 36-37. After finding that the non-public schools aided, for the most part, were church-related or religiously-affiliated educational institutions, *id.*, at 34, the court held that the program had a primary effect of advancing religion. *Id.*, at 37. The court also held, as did the District Court in the case before us, that excessive entanglement of church and state would result from attempts to police use of material and equipment that were readily divertible to religious uses. *Id.*, at 38-39. *This Court's affirmance of the result in Marburger was a decision on the merits, entitled to precedential weight.* See *Edelman* v. *Jordan*, 415 U.S. 651, 670-671, 94 S.Ct. 1347, 1359-1360, 39 L.Ed.2d 662; cf. *Cincinnati, N.O. & T.P.R.Co.* v. *United States*, 400 U.S. 932, 935, 91 S.Ct. 235, 237, 27 L.Ed.2d 240 (White, J., dissenting from summary affirmance 421 U.S. at 366). (Emphasis added.)

In the light of the Court's decision in *Cathedral Academy* and its affirmance in *Byrne*, we suggest that District Court's assumption in the present case that the Supreme Court has retreated from its steadfast position on aid to church-related or religious schools is erroneous.

Conclusion

Under the provisions of the Civil Rights Act of 1964 and the decision of this Court in *NLRB* v. *Catholic Bishop of Chicago, supra,* the religious schools in this case are exempt

from the statutory prohibtion of religious discrimination in admission of student and employment of faculty. The purpose of the exemption is to safeguard the First Amendment protection of religious schools. But the same First Amendment prohibits use of tax-raised funds to finance the educational operations of these schools. That prohibition, as interpreted and applied by the courts in the cases cited in this brief and many others, is based upon the implicit categorical imperative that it is both unconstitutional and inequitable to compel all persons regardless of religion to pay taxes used to finance the operations of schools from which some of them are excluded because of their religion.

For the reasons stated, the decision of the District Court should be reversed and Chapter 507 of the New York Laws of 1974, as amended by Chapter 508 should be declared unconstitutional insofar as they encompass and include religious schools.

Respectfully submitted,

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